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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 433

SEBASTIANO NANI, PETITIONER

v.

HERBERT BROWNELL, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported (Pet. App. 19–22). The memorandum opinion of the district court appears at pages 7–9 of the record.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1957 (Pet. App. 23). The petition for a writ of certiorari was filed on September 6, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether conspiracy to violate the narcotic laws was a deportable offense under Section 241 (a) (11)

of the Immigration and Nationality Act of 1952, prior to its 1956 amendment.

2. Whether failure to notify the petitioner of the ruling of the Board of Immigration Appeals prior to its transmission to the Attorney General, and the failure to give him the opportunity to present his views to the Attorney General, violated the regulations or denied petitioner due process.

STATUTES AND REGULATIONS INVOLVED

Section 241 (a) (11) of the Immigration and Nationality Act of 1952, 8 U. S. C. 1251 (a) (11), provided:[1]

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, tranportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt deriva-

[1] Section 301 (b) of the Narcotic Control Act of 1956, 70 Stat. 567, 575, amended this provision *inter alia* by specifically referring to aliens convicted of conspiracy to violate the narcotic laws.

tive or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate;

* * * * *

Section 292, 8 U. S. C. 1362, provides:

In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

8 C. F. R. 6.1 provides in pertinent part:

(a) There shall be in the office of the Attorney General a Board of Immigration Appeals. It shall be under the supervision and direction of the Attorney General and shall be responsible solely to him. * * *

(b) Appeals shall lie to the Board of Immigration Appeals from the following:

* * * * *

(2) Decisions of special inquiry officers in deportation cases, * * *

* * * * *

(d) (1) * * * the Board shall exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case, * * *

(2) The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. * * *

* * * * *

(f) The decision of the Board shall be in writing and copies shall be transmitted by the Board to the Service and a copy served upon the alien or party affected as provided in §§ 292.11 and 292.12 of this chapter.

* * * * * *

(h) (1) The Board shall refer to the Attorney General for review of its decision all cases which:

(i) The Attorney General directs the Board to refer to him.

(ii) The chairman or a majority of the Board believes should be referred to the Attorney General for review.

(iii) The Commissioner or the Assistant Commissioner, Examinations Division, requests be referred to the Attorney General for review.

(2) In any case in which the Attorney General shall review the decision of the Board, his decision shall be stated in writing and shall be transmitted to the Board for transmittal and service as provided in paragraph (f) of this section.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the District of Columbia Circuit which, in affirming the judgment of the District Court for the District of Columbia, held that petitioner's conviction for conspiracy to violate the narcotic laws was a deportable offense within Section 241 (a) (11) of the Immigration and Nationality Act of 1952, 66 Stat. 206, *supra*, p. 2.

Petitioner, a native and citizen of Italy, entered the United States as a stowaway on October 2, 1924. On May 11, 1944, he was granted suspension of de-

portation pursuant to Section 19 (c) (2) of the Immigration Act of 1917 (R. 12, 19). On August 27, 1954, he was convicted in the United States District Court for the Northern District of California of conspiracy to sell heroin in violation of the Harrison Narcotic Act (26 U. S. C. 2553 and 2557) and to conceal and facilitate the concealment and transportation of heroin in violation of the Miller Export Import Act (21 U. S. C. 174) (R. 12–13, 15, 19).

On August 30, 1954, while in prison under this conviction, deportation proceedings were commenced against him by service of a warrant for arrest (R. 10–11). The warrant charged that he was deportable under Section 241 (a) (11) of the Immigration and Nationality Act, because (R. 10):

> * * * he has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of any of the drugs described therein; conspiracy (18 U. S. C. 371) to violate Jones-Miller Act (21 U. S. C. 174) and Harrison Narcotic Act (26 U. S. C. 2553 (a)).

After a hearing, the Special Inquiry Officer ordered deportation (R. 11–13). The Board of Immigration Appeals, on April 14, 1955, rendered a decision reversing the finding of the Special Inquiry Officer on the ground "* * * that the crime of conspiracy does not constitute a conviction of a violation of a law relating to the illicit traffic in narcotic drugs" under

Section 241 (a) (11) of the 1952 Act (R. 14–17). Thereafter, the Commissioner of Immigration requested that the case be referred to the Attorney General for review (R. 17–19). The Board complied without notifying petitioner of such referral. On September 23, 1955, the Attorney General reversed the Board of Immigration Appeals on the ground that Section 241 (a) (11) of the 1952 Act was "[o]n its face * * * broad enough to cover a conviction for conspiracy to violate the narcotic laws" (R. 19–21). Thereafter copies of the Attorney General's and the Board's decisions were transmitted to petitioner (R. 4).

Petitioner then instituted this action for a declaratory judgment to review the deportation order (R. 1–5). The district court affirmed the administrative determination and granted the government's motion for summary judgment (R. 6–9). On appeal, the judgment was affirmed (Pet. App. 19–21). Judge Bazelon dissented on the ground that the regulations afforded petitioner the right to defend the Board's decision before the Attorney General (Pet. App. 21–22).

ARGUMENT

1. Petitioner contends (Pet. 14–17) that a conviction for conspiracy to violate the narcotic laws was not a deportable offense under Section 241 (a) (11) of the 1952 Act because such a conviction was not, in the terms of that section, a "violation of any law or regulation relating to the illicit traffic in narcotic drugs", but was a violation of the separate law, 18 U. S. C. 371, defining the separate crime of conspiracy.[2]

[2] Although the petitioner was convicted in 1954, the offense apparently occurred before the Act of November 2, 1951 (65

The decision below is correct in holding that, even before the 1956 amendment specifically covering conspiracy to commit narcotics offenses (see fn. 1, *supra*, p. 2) conspiracy was covered by Section 241 (a) (11). Unlike the Act of 1931,[3] Section 241 (a) (11) of the 1952 Act contained, for the first time, sweeping language providing for the deportation of aliens illicitly trafficking in narcotic drugs. The absence of any specific reference to conspiracy convictions (as had been made in the 1931 Act) was probably due to the fact that the new law, in using the words "any law or regulation relating to the illicit traffic in narcotic drugs", was thought to be broad enough to encompass both the substantive offender and the conspirator. The legislative history shows that Congress intended to broaden, not limit, the area of deportability with respect to aliens trafficking in narcotics. Thus, in its comprehensive study of the existing immigration sys-

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Stat. 767—the Boggs Act) which amended the Jones-Miller Act (21 U. S. C. 174) and the Harrison Narcotics Act (26 U. S. C. 2557 (b)) to make conspiracies to violate those acts specific crimes.

[3] 46 Stat. 1171, as amended, 54 Stat. 673, provided:

"That any alien (except an addict who is not a dealer in, or peddler of, any of the narcotic drugs mentioned in this Act) who, after the enactment of this Act, shall be convicted for violation of or conspiracy to violate any statute of the United States or of any State, Territory, possession, or of the District of Columbia taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, or any salt, derivative, or preparation of opium or coca leaves, shall be taken into custody and deported in manner provided in sections 19 and 20 of the Act of February 5, 1917 * * *"

tem, the Senate Sub-Committee on the Judiciary suggested, in 1950 (S. Rep. No. 1515, 81st Cong., 2d Sess., p. 410):

> * * * that the immigration laws contain specific provision for the deportation of aliens *who have been convicted of any law pertaining to narcotics.* Such aliens should be deportable, whether the conviction occurred prior to or after entry into the United States. *The deportable class will include those convicted under any law in this country pertaining to narcotics or under any such law of a foreign country.* [Emphasis added.]

The new provision was to apply to "[a]liens who, after entry, hereafter become narcotic drug addicts, or who at any time after entry becomes traffickers in narcotics". See S. Rep. No. 1137, 82d Cong., 2d Sess., p. 22. To the same effect, see H. Rep. No. 1365, 82d Cong., 2nd Sess., p. 60. It would be contrary to the clear Congressional intent to allow persons convicted of involvement in a scheme involving narcotics trade to escape deportation.

Petitioner's argument that conspiracy was not covered in 1952 relies heavily on the fact that the 1956 amendment specifically made conviction for conspiracy a ground for deportation, and on statements made in a letter from the Deputy Attorney General dated May 4, 1956, to the Senate Judiciary Committee supporting the amendment, and in Congressional reports, both suggesting that the amendment would provide an additional ground for deportation. (See S. Rep. No. 1997, 84th Cong., 2d Sess., pp. 16–21.) These statements, four years after the 1952 Act with relation to a

statute dealing mostly with matters other than immigration, do not change the effect of the 1952 language and legislative history. The Commissioner of Immigration has consistently taken the position that the 1956 amendments were merely desirable clarification. The legislative history of the Narcotic Control Act of 1956 reveals that pursuant to S. Res. 67, 84th Cong., 1st session, adopted March 18, 1955, the Senate Sub-Committee on the Judiciary commenced a study into narcotic problems (101 Cong. Rec. 3179–3180). During the hearings, the Commissioner of Immigration testified as follows:

> Mr. SWING. As long as we are on that, just one more point with the law. The word "conspiracy" to violate the act, you can be the head man and the head of a conspiracy that is going to bring this narcotic in here, but unless you personally have been indicted, convicted of these listed items, of importation or exportation, and so on, if you merely conspire or are convicted of conspiracy to import it or export it, it has been argued that under the law you are not deportable, because the word "conspiracy" has been left out.
>
> *This interpretation has not been accepted, but I am going to suggest the recommendation anyhow to make it specific and clarify it, that that is a deportable charge* [emphasis added]. [Hearings before the Subcommittee on Improvements in the Federal Criminal Code of the Committee on the Judiciary, 84th Cong., 1st Session, Part VI, p. 2144.]

Apparently adopting the Commissioner's view, the Senate Bill (S. 3760) as originally introduced on April 30, 1956, contained the conspiracy amendment

(102 Cong. Rec. 7246).[4] During subsequent hearings held on May 4, 1956, the letter from the Deputy Attorney General was received. At the same time, a letter from the Commissioner of Immigration was also received by the Senate Subcommittee which reiterated his previous views, see *supra*, p. 9, that the amendment was beneficial because it " * * * strengthens and clarifies provisions of the Immigration and Nationality Act relating to the exclusion and deportation of violators of narcotic drug laws, * * * ". See, Hearings Before the Subcommittee on Improvements in the Federal Criminal Code of Committee of the Judiciary, 84th Cong., 2d Sess.; pp. 7–11, 13–14.

In any event, there can be no doubt that under the 1956 amendment, conspiracy convictions are deportable offenses under Section 241 (a) (11). Hence, there is now no question of general importance relating to the construction of this statute requiring the attention of this Court.[5]

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[4] The original House Bill (H. R. 11619), introduced on June 6, 1956, contained no such amendment (102 Cong. Rec. 9728). The Senate amendments were thereafter adopted by the Conference Committee. H. Conf. Rep. No. 2546, 84th Cong., 2d Sess., p. 17.

[5] The petitioner's argument that the Attorney General found him deportable for violation of a law relating to illicit traffic in narcotics while the warrant instituting the deportation proceeding alleged violations of the law controlling the "taxing, manufacture, production, compounding, transportation, sale" etc. of drugs (Pet. 12–14) is difficult to understand. If, by this argument, the petitioner means that the warrant charged conviction for violation of the substantive offense, rather than for conspiracy, it rests on a partial reading of the warrant which specifically referred to conspiracy to violate the Jones-Miller Act and the Harrison Narcotic Act. See p. 5, *supra*. If, by his argument, the petitioner means that the Attorney General did not find a conviction for an offense relating to the "taxing, man-

2. The petitioner's argument (Pet. 9–12), that the failure to notify him that the case was being referred to the Attorney General for review and to give him an opportunity for further hearing violated the regulations and was a denial of due process, misconceives the nature of the process involved.

Under Section 103 of the 1952 Immigration and Nationality Act (66 Stat. 173–174), the Attorney General is charged with final control over the administration and enforcement of the Act. Pursuant to his authority, he has adopted regulations establishing the Board of Immigration Appeals to act for him in considering appeals (8 C. F. R. 6.1 (b) (2), (d) (2)). On such appeals, aliens are accorded the right of oral argument, representation by counsel, submission of briefs—in short, the complete right to be heard (8 C. F. R. 6.1 (e), 6.11). Petitioner received, and availed himself of, all of these safeguards. Thus, the requirements of Section 292 of the Act, providing that an alien have the privilege of representation by counsel "* * * in any appeal proceedings before the Attorney General * * *" from decisions of special inquiry officers, were manifestly satisfied by the rights accorded the petitioner before the Board.[8]

The additional consideration given the petitioner's case by the Attorney General was not in the course of an

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ufacture" etc of drugs, this too is in error since the conclusion of the Attorney General certainly covered conspiracy to violate 21 U. S. C. 174 as well as 26 U. S. C. 2553 (a).

[8] Congress was, of course, fully apprised of the Attorney General's practice and knew that appeals were passed upon by the Board of Immigration Appeals except in the special circumstances when they were referred to him. S. Rep. No. 1515, 81st Cong., 2d Sess. p. 347.

additional appeal, but was part of the appeal on which he had already been heard. It occurred pursuant to the regulations (8 C. F. R. 6.1 (h) (1) (2)) because the case was one of those in which it was deemed appropriate for the Attorney General, as a matter of intradepartmental administration, to reexamine the conclusions of the board for which he was responsible. Since in that very proceeding, the petitioner had been fully heard there was no necessity of inviting additional briefs and argument.'

Nor did the failure to transmit a copy of the Board's opinion to the petitioner prior to the referral of the case to the Attorney General violate the regulations. This was in accord with the regular practice of the Board in those cases where its decision is reexamined by the Attorney General. The regulation, 8 C. F. R. 6.1 (f), *supra*, p. 4, requires the Board to serve its decision upon the alien affected thereby. But in cases where the Board's decisions are referred to the Attorney General, they have no finality (8 C. F. R. 6.1 (d) (2), *supra*, p. 3) and are therefore not at that time decisions affecting aliens within the meaning and intent of the regulations. When a final decision had been reached by the Attorney General affecting the petitioner's rights, a copy of it, together with the Board's opinion, was transmitted to him.

The very question here involved was raised in *Ex parte Bridges*, 49 F. Supp. 292 (N. D. Cal.), affirmed,

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'The view that an alien does have a right under the regulations to submit written briefs and memoranda to the Attorney General was taken in *Bannout* v. *Brownell*, 129 F. Supp. 488 (D. D. C.), which we believe was wrongly decided.

sub nom. Bridges v. *Wixon*, 144 F. 2d 927 (C. A. 9), reversed on other grounds, 326 U. S. 135. There the district court stated (49 F. Supp. at 304):

> Petitioner filed briefs with the Presiding Inspector and with the Board of Immigration Appeals. His side of the case, on the facts, was well presented in the opinion of the Board of Immigration Appeals. These documents were all a part of the record submitted to the Attorney General. Petitioner makes no claim that had he been given the opportunity of arguing his case further before the Attorney General he would have raised any point which had not been fully covered already in his briefs on file or in the Board Memorandum. The failure to afford petitioner the opportunity of re-arguing his side of the case before the Attorney General did not deny him due process.

The basic fault in the petitioner's position is the failure to recognize the Board of Immigration Appeals as merely an *alter ego* of the Attorney General. This Court described it in *Accardi* v. *Shaughnessy*, 347 U. S. 260, 266–267, as follows:

> The Board is appointed by the Attorney General, serves at his pleasure, and operates under regulations providing that: "In considering and determining . . . appeals, the Board of Immigration Appeals shall exercise such discretion and power conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case. * * *" * * * [It] is a nonstatutory board composed of subordinates within a department * * *.

When the petitioner appeared before the Board he was in effect appearing before the Attorney General. Neither the regulations nor the Fifth Amendment gave him the right to make additional appearances merely because the Attorney General chose to give the case additional consideration.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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